

Amendments to the Freedom of Information Act
Impacts of Act 1653 of 2001 as prepared for the Association of Arkansas Counties
May 16, 2001

During the 2001 Legislative session, the following changes were made to the Arkansas Freedom of Information Act. These changes were recommended after 18 months of study by the Electronic Records Study Commission, a diverse body of individuals who represented state/city/county governments, school districts, and a variety of press organizations. Their charge was to consider changes to the Freedom of Information Act that would enhance citizen access to government records by including new provisions for electronic access to electronically stored records and harmonizing these new provisions with existing requirements in the paper realm.

Summary of Changes to the FOIA – Act 1653

- Establishes a definition of the “custodian” of a public record, so that the person administratively responsible for the record responds to the FOIA request, no matter where the record may reside electronically.
- Includes electronic records specifically in the Act’s definition of “public records” and clarifies that proprietary software does not fall under the definition of “public record.”
- Allows citizens to not only inspect and copy records (as allowed by existing law), but also allows them to request to receive copies (making consistent a practice that has been in effect in most areas for quite some time).
- Provides specifically that FOIA requests may be made electronically, e.g., by e-mail; requires that requests be reasonably specific; and provides that the requestor be directed to the appropriate custodian to satisfy the request.
- Avoids any risk to federal education funds by making the Act’s “scholastic records” exemption consistent with the Federal Educational Rights and Privacy Act of 1974.
- Provides an exemption for information regarding security measures (e.g., passwords) on government computer networks.
- Provides that citizens may request electronic copies of records and establishes standards for copying fees. Copying fees may not exceed the actual cost of reproduction, unless another statute so provides. Allows agencies to charge the actual costs for postage or facsimile or other electronic transmission. The bill also allows custodians to reduce or waive copying charges when it is in the public interest to do so.
- Clarifies that a custodian is not required to create a record that does not already exist (for example, to create a new database or program new report features), and provides that a

citizen may request public records in any medium or format in which they can be made readily available.

- Provides that an FOIA request may not be denied on the grounds that information exempted from disclosure (e.g., tax and medical information) appears in the same record as public information. The confidential information must be deleted and the remainder of the record released, with indications where the deletions were made.
- Provides that computer hardware and software acquired by public entities after July 1, 2001, not impede access to public records. E.g., agencies should make sure that software they acquire has adequate reporting capabilities to permit FOIA compliance and not frustrate it.
- Requires state agencies, boards, and commissions to do what most must already do under the Administrative Procedure Act, i.e., make certain basic information publicly available without request. Any such information created after July 1, 2003 must be made available on the Internet, something that many agencies, boards, and commissions are already doing today.
- Reduces the burden on agencies, boards, and commissions in responding to FOIA requests. If a requested record is available via the Internet the custodian may simply advise the requestor of that fact. This response is sufficient unless the requester wishes to obtain a copy of the record in another medium.
- Provides for special requests for electronic records and encourages agencies to provide information as requested when reasonably possible. Allows custodians to apply common sense discretion to summarize or compile electronic data in a particular manner, medium, or format in which it is not readily available and gives them the ability to charge actual verifiable costs, including personnel time.

Specific Changes Regarding Copying Charges for Citizens

As mentioned in the bullets above, the act now allows citizens to be able to request to receive copies (a common practice among some custodians for quite some time) and allows agencies to charge actual costs of reproduction for the copies. To paraphrase from Section 2 (d):

Upon request and payment of a fee... the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment...

Any fee for copies shall not exceed the actual costs of reproduction...

Reproducing Existing Records

Question: May I collect the fee for copying records before releasing the copy?

Answer: Yes, you may request payment for actual costs of reproduction at the time the request is made, before releasing the copy.

Question: What if the request is particularly voluminous and copy fees are extensive? How can I be sure to collect the actual costs?

Answer: If the estimated cost for reproducing the records exceeds twenty-five dollars (\$25.00), you may require the requestor to pay that fee before the copying is undertaken.

Question: Do my copy fees need to be re-evaluated and changed?

Answer: If you are a custodian whose current copy fee structures are in excess of actual and verifiable costs for reproducing existing documents under the FOIA, those practices will need to change. If these copying services produce a revenue stream in excess of cost (i.e., a profit), they would be out of compliance with existing law.

Question: What can I include in the costs for reproduction?

Answer: You may include the costs of the medium of reproduction, supplies, equipment, and maintenance, but you may not include *existing agency* personnel time associated with searching for, retrieving, reviewing, or copying the records.

Question: Can I charge for extra help if required for copying?

Answer: If a requestor's need for copies can only be met in a timely way by employing outside, non-agency, temporary help, you may charge for those costs.

Special Requests for Electronic Information

Question: What if I have a request that causes me to have to manipulate electronic records or create a record out of the ordinary?

Answer: The new Section 4 of the law deals specifically with extraordinary requests of this type. If you do not have readily available resources to comply with a special request for electronic records then you have the reasonable discretion to agree to perform the work. If you agree to do so you may charge the actual, verifiable costs of personnel time exceeding two (2) hours associated with the task. However, the charge for personnel time shall not exceed the salary of the lowest paid employee or contractor who, in your opinion, has the necessary skill and training to respond to the request.

Items not Covered by Act 1653

The Commission was asked to consider whether the negligence standard in the Act's criminal penalty was appropriate in an electronic environment. Likewise, the ERSC was asked to consider clarification of the Act's term "public meeting" in an electronic age. In addition, the group had several discussions about the impact of electronic public information on citizens' privacy interests. However, the Commission did not believe that the first two were within the scope of its charge under Act 1060 and felt that privacy concerns would be better addressed in separate privacy legislation. Accordingly, the Commission recommends only the above amendments.